No. 2804

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of DAVID JACOBS and ISAAC JACOBS, Copartners Doing Business as JACOBS BROS.,

Bankrupts,

DAVID JACOBS and ISAAC JACOBS,

Petitioners,

vs.

S. T. HILLS, as Trustee of the Estate of DAVID JACOBS and ISAAC JACOBS, Doing Business as JACOBS BROS., Bankrupts,

Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE.

(Our italics throughout.)

The statement of the case by petitioners is very brief, but the facts are fully set forth in the record, particularly pages 22-28.

We wish also to add, for the purpose of clarifying the opinion of the trial judge, that his opinion covers three separate and distinct matters. First—He reviewed the testimony, findings and order of the referee on the trustee's petition to recover concealed assets amounting to $3,189.00. This is the only matter now on review in this Court. Second—The District Court heard the trustee's second petition alleging concealment by the bankrupts of *other* merchandise between February 3rd and June 2nd of over $20,000. This petition he dismissed because the evidence was not satisfactory beyond a reasonable doubt. Third—The District Court heard the application of the bankrupts for a discharge and the objections of the creditors thereto. The objections were sustained and a discharge refused. No appeal or review has been taken on these last two matters.

The findings of the District Court relating to the concealment of $3,189.00 worth of merchandise were based upon the evidence submitted before the referee. (R. 22-29).

I.

The bankrupts complain of finding of fact No. 9 (R. 41, 42) that the bankrupts had concealed

other merchandise exceeding $14,000.00 between February 3, 1915, and June 2, 1915, as wholly immaterial and that the facts therein stated are not involved in any of the issues raised by said petition.

The issue was presented by paragraph III of the Petition, which alleged a "fraudulent conspiracy on the part of said bankrupts to cheat and defraud their creditors extending over a period of at least one year last past," etc. (R. 13).

The materiality of the allegation and the finding is of some importance in considering motive or intent to defraud, and to that extent proof of other fraudulent acts of a similar character is always admissible.

Kettenbach vs. United States, 202 Fed. 377, (C. C. A. 9th), quotes *Wood vs. United States,* 16 Pet. 342, 10 L. Ed. 987, where Mr. Justice Story said:

> "The question was one of fraudulent intent or not; and upon questions of that sort, where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party of a kindred character, in order to illustrate or establish his intent or motive in the particular action directly in judgment. Indeed, in no other way would it be practicable in many cases to establish such intent or motive."

State vs. Schuman, 89 Wash. 9, 153 Pac. 1084, holds:

> "It is, of course, a general rule that evidence of the commission of a separate and distinct crime is inadmissible to aid the conviction of a defendant for the crime charged. There are, however, exceptions to this rule as thoroughly established as the rule itself. Where the purpose is to show a system or general design from which a criminal intent or purpose may be inferred in the commission of the particular act charged, collateral offenses of the same character and perpetrated in the same way, though not otherwise connected, can always be put in evidence as tending to establish the system or design. The logical basis of this exception to the general rule of exclusion is thus admirably expressed by Wharton."

12 *Cyc.* 411, states the rule: Often where the crime charged is one of a series of swindles or other crimes involving a fraudulent intent, for the purpose of showing such intent such evidence is admissible.

See findings in *In Re Fuhrman,* 220 Fed. 787, (C. C. A. 9th).

Also see:

12 *Cyc.* 408-410.

29 *Cyc.* 1081.

State vs. Craddick, 61 Wash. 425, 112 Pac. 491.

State vs. Wappenstein, 67 Wash. 502, 121 Pac. 989.

Counsel for bankrupts is correct in stating that the allegations of the trustee's petition relating to concealment of *other* merchandise was stricken by the referee on motion. However, the record shows that the evidence was admitted by the referee (R. 22, 25, 26). The referee found that the bankrupts proceeded with "a well-defined purpose to defraud their creditors." (R. 7). This evidence was submitted to the District Judge upon petitions for review filed by the bankrupts and the trustee, and the District Judge considered said evidence, held it was competent, material and relevant and made a finding accordingly. Since referees sit as special masters, it was within the province of the District Judge's powers to make and enter such a finding.

If the law were otherwise, no error was committed; for the finding was not indispensable to the order. The order would stand unassailable without the finding of other frauds. In other words, this finding might be treated by the court as surplusage. The bankrupts will never suffer any liability on the concealment of *other* merchandise, because the trustee's petition relating thereto was dismissed by the District Judge. Inasmuch as the finding could be dispensed with and the result in nowise be affected,

the bankrupts, *taking their view of the matter,* have nothing to complain of. The matter not being prejudicial, the bankrupts cannot successfully complain.

Chicago Ri. Ry. Co. vs. Wright, 239 U. S. 36, 36 S. C. R. 185.

We think such a finding proper under the law; and, as a matter of common sense, such evidence would add to the moral certainty of the court that fraud was committed between June 2nd and 5th.

II.

The bankrupts next complain of finding of fact No. 10 as immaterial and not involved in any of the issues raised by the petition. In any case, the destruction of the books of account and records is a circumstance indicating an intent to defraud and is a fraud sufficient to bar a discharge under the bankruptcy act. Sec. 14-b-2.

Glass vs. United States, 231 Fed. 65 (C. C. A. 3).

These facts were adduced before the referee. (R. 26-27).

III.

Error is assigned to that part of the finding No. 11 which finds that the bankrupts *now* have

property of the value of $3,189 as being immaterial and not involved in any of the issues raised by the petition.

Paragraph II of the petition alleged that "merchandise of the value of $3,189.08 has been wrongfully and unlawfully and fraudulently taken, removed and concealed from said store by said David Jacobs and Isaac Jacobs, and that the said David Jacobs and Isaac Jacobs *have* in their possession and under their control goods, wares and merchandise of which the trustee herein *is* the owner and entitled to the possession thereof." Thus the issue was expressly raised.

Counsel of the bankrupts contend that the Court should have confined said findings to the date of the filing of the petitions alleging bankruptcy (June 13, 1915); that said finding should not also speak as of the date of the making and entry of the order, which was on May 15, 1916.

This is not a new question before this Court. The lower court is sustained by the rule laid down by Judge Hanford in *Ripon Knitting Works vs. Schreiber,* 101 Fed. 810, from which a review was sought by the bankrupts and dismissed by this Court, 104 Fed. 1006. Judge Hanford said on page 811:

> "* * * The referee made a finding that the bankrupt has in his possession and unlawfully withholds from the trustee of the estate, at least $6,000.00, and thereupon made an order requiring him to pay that amount to the trustee within a period of five days. Exceptions were taken to said findings and order, and the Court, upon a review of the evidence, and further examination of all the books and memoranda relating to the business, reached the conclusion that the referee had not given full credit for all the money paid for merchandise and expenses of the business and thereupon modified the order of the referee by fixing the amount of money adjudged to be in the possession of the bankrupt and wrongfully withheld by him as $3,000, which amount the bankrupts were required to pay to the trustee forthwith."

After reciting these facts and others the Court took up the matter of the bankrupt's contempt and found him guilty.

In the *Fuhrman case,* 220 Fed. 787, which came to this Court upon review of the contempt proceedings, the referee and the Court, upon the petition of the trustee to deliver concealed assets, entered findings identical with those made in the case at bar. Judge Ross said:

> "The judgment of the Court below affirming the findings and order of the referee, not having been appealed from or otherwise questioned by either the respondents, established that at the date of its entry—July 23, 1913—the money in question was in the actual possession and under the control of said bankrupt and his said wife, and was then being by them

fraudulently concealed and withheld from the creditors of the bankrupt."

Moorehouse vs. Pacific Hardware & Steel Co., 177 Fed. 337, cited by bankrupts, was a contempt case and throws no light on the subject.

That the findings should speak as of the date of the order is the rule generally prevailing.

First Circuit. *In re Krall,* 182 Fed. 191, (D. C. Conn.).

In re Walder, 16 A. B. R. 41 (D. C. Conn.).

Second Circuit. In this Circuit the orders made and entered all speak of the concealment as of the date of the entry of the order, and in no case relate to concealment existing on the date of the filing of the petition.

In re D. Levy & Co., 142 Fed. 442.

In re Stavrahn, 173 Fed. 330, (Contempt case).

In re Weber, 200 Fed. 404. (Contempt case).

In re Graning, 229 Fed. 370. (Contempt case).

Fourth Circuit. In *Kirsner vs. Taliaferro,* 202 Fed. 51, the Court said on page 58:

"The bankrupt further says that there was absolutely no evidence before the referee or

> before the Court below to show that he was able to comply with the decree or that he then had said goods in his possession or proceeds derived from the sale or disposal thereof,"

but the Court cited the general rule laid down in *In Re Meier,* 182 Fed. 799, to the effect that possession at the time of the entry of the order was presumed from the fact that the goods were in the bankrupt's possession shortly before adjudication. On page 60 the Court said:

> "It must be borne in mind that the form of the order in the case at bar was that the bankrupt should be imprisoned not for a definite term as a punishment, but until he complied with the order by turning over the property in question to his trustees. It is because the order is so worded that the *court must be satisfied of the present ability of the bankrupt to comply with it.*"

FIFTH CIRCUIT. In *Stuart vs. Reyolds,* 204 Fed. 709, the Court said:

> "From the evidence before him, which was of a conflicting nature, the judge was unable affirmatively to find as a fact that the bankrupt, *at the time of the making of the order* against him by the referee, then had in his possession or under his control either the goods or the money he was directed to turn over to the trustee of his estate. Failing to find this, it was incumbent on the judge to reverse the action of the referee and discharge the rule against the bankrupt."

See

Samel vs. Dodd, 142 Fed. 68.

In re Reynolds, 190 Fed. 967 (D. C. Ala.).

In re Dickens, 175 Fed. 808 (D. C. Ala.).

Sixth Circuit. This Circuit Court of Appeals does not appear to have passed on the question, but the rule as laid down in district courts is the same as in the case at bar.

In re Kreuger, 197 Fed. 124, (D. C. Ky.).

Seventh Circuit. *In re Rosser,* 101 Fed. 562, the Court said of the power to require bankrupts to surrender and deliver property to the trustee that it should be exercised with great caution and that

> "two essential facts limit this power and condition its lawful exercise. They are that the money or property directed to be delivered to the trustee or other officer of the court is a part of the bankrupt estate, and that the bankrupt or person ordered to deliver it has it in his possession or under his control at the time that the order of delivery is made. If the property is not a part of the estate, obviously no lawful order for its delivery to the trustee can be made. If the money or property in controversy was a part of the estate of the bankrupt, but before the order for its delivery is made he has squandered, disposed, or lost it, so that it is not in his control or possession, and he cannot obtain and deliver it at the time the order of delivery is made, or within a reasonable time thereafter, it cannot be a lawful order, because the court may not order one to do an impossibility, and then punish him for refusal to perform it."

This rule was followed in

Schweer vs. Brown, 130 Fed. 328,

In re Meier, 182 Fed. 799,

Shea et al vs. Lewis et al, 206 Fed. 877.

In re Alphin & Lake Cotton Co., 134 Fed. 477, (D. C. Ark.).

Eighth Circuit. *In re Baum,* 169 Fed. 410:

"The Court found in its order that he concealed assets, and from the fact that it ordered the bankrupt to pay over money it must be presumed, we think, that it found that the assets consisted of money, and that the same was in his possession and under his control, at the time the order was made, and that he was able to comply with the order."

Boyd vs. Glucklich, 116 Fed. 131.

In re Mayer, 98 Fed. 839 (D. C. Wis.).

"Present possession or control must be proved. It will not do simply to prove the bankrupt ought still to have the possession or control; it must be proved that he actually still has possession or control."

Rem. on Bankruptcy, Sec. 1845, page 1142, and Supp.

In one Circuit only does the rule obtain as contended for by the bankrupts. In the Third Circuit the rule now is that the order to deliver concealed merchandise should be based upon a finding that

the assets were concealed at the time of the filing of the petition, and the court should not inquire of what took place subsequent thereto; such matters shall properly be inquired into upon contempt proceedings only.

Epstein vs. Steinfeld, 210 Fed. 236, affirming 206 Fed. 568.

In re Pennell, 214 Fed. 337.

Schmidt vs. Rosenthal, 230 Fed. 818.

In the *Pennell* case and in the *Schmidt* case the order was not reversed, but was simply modified by striking out the "now conceals." This rule, we believe, is unsound:

1. The rule first laid down in *Epstein vs. Steinfeld, supra,* in 1914, is not supported by authority. The opinion states the rule of practice was first laid down in an earlier decision of that court, *American Trust Co. vs. Wallis,* 126 Fed. 464. As we read the *Wallis* case, it holds the very contrary. In our opinion, that case holds that it would be absurd to enter an order to deliver assets in the absence of proof of the physical ability of the bankrupt to comply; for (1), enforcement by contempt proceedings would result in nothing, and, (2), "the contempt could be purged only by a reiteration of the physical impossibility to comply with the order

(to return assets) whose disobedience is being thus punished."

II. As a protection of its own dignity, a Court should not make an order in *personam* unless it can be performed. It ought not direct a thing to be done unless it can be done. A court ought not to order a man to turn over assets if he hasn't got them; or make the order whether or not the bankrupt has any to deliver. Making orders impossible of performance is not only arbitrary but also as futile as the commands of King Canute to the rising tide. Respect for the courts can best be maintained by making orders that can be obeyed and by a constant and faithful enforcement of those orders once made.

III. As a protection to the bankrupt, the order to deliver should not be made unless he can make the delivery ordered. No man should suffer the loss of reputation incident to an adjudication of contempt of Court, even though he be allowed to purge the contempt by showing the impossibility. In fine, there could be no contempt—not having the assets, he never had the *opportunity* to either obey or disobey, comply or refuse.

IV. *Re-delivery* is the relief sought and the issues are thereby determined. If the person pro-

ceeded against hasn't got the goods, that should end the case. If he has them, enforcement by contempt should follow refusal to obey.

The issue on contempt proceedure is: Is the defendant guilty or not guilty of disobedience? Did he obey or disobey the order of the Court? Then, the question of the correctness of the order to deliver is not under review. The case is not to be retried. Matters covered by it are *res adjudicata.* The bankrupts' only defense is to show what disposition he made of the goods subsequent to the order. Otherwise, the same facts are again tried on the contempt proceedings and the same questions are twice adjudicated and justice delayed.

In re Laus, 158 Fed. 610, (C. C. A. 2).

V. The utter ridiculousness of this rule of procedure is better seen by illustration.

Suppose, following the practice of the Third Circuit, the proof is limited to the date of the filing of the petitions (June 13th) and that the proof was abundant, as it was, that Jacobs Bros. had the merchandise in question on that day, and then suppose that Jacobs Bros. come forward and tender as a defense that they had stored the goods in a certain building and that a fire destroyed same and its contents on September 1st. Is the court going to refuse

to hear this evidence and find the bankrupts had the merchandise on June 13, 1915, and order on May 15, 1916, the bankrupts to deliver said merchandise, and then purge them of contempt because of the fire on September 1st, in the so-called second stage of the proceeding?

Again, suppose Jacobs Bros. tender a different defense by offering to show that on September 1st they turned this merchandise over to their father and that he has it. Is the order to be directed against Jacobs Bros.? If against the father, is the inquiry to relate to June 13th, the date of the filing of the petitions alleging bankruptcy? or to September 1st, the date of the transfer, and that date only? If June 13th, the trustee, of course, can make no case. Nor is the law so foolish.

> *Bryan vs. Bernheimer,* 181 U. S. 188; 44 L. Ed. 814; 21 Sup. Ct. Rep. 557.

VI. What good purpose is subserved by this course pursued in the Third Circuit? The very purpose and object of the action is to secure possession of the merchandise. If non-existent, why the idle inquiry of what was and is not? Why should we later, say in January, 1917, introduce evidence in contempt proceedings to show that the bankrupts possessed and had the ability to deliver

said assets on May 15, 1916, when on May 15, 1916, we were in court to determine that very question?

On the contrary the burden is on the bankrupt to purge the aforesaid contempt by proving, if possible, his inability to comply with order to surrender assets. In the *Fuhrman* case this Court said:

> "That judgment placed the legal duty upon both husband and wife of complying with its requirements. That such compliance is enforceable by proceedings in contempt is beyond question. Equally plain is it that the burden is upon the delinquent who claims to be incapable of making the delivery decreed, to prove the fact of such inability."

Counsel for bankrupts states that the findings of the District judge are not based upon evidence taken before the referee. This is not a correct statement. The recitals preceding the findings refer only to the evidence taken before the referee. The District judge made separate findings as to the concealment alleged between February 3, 1915, and June 2, 1915. He also made separate findings concerning the objections to the bankrupts' application for a discharge. These matters were all separately considered by the District Court.

It is a forced argument that a finding of present ability should not be made because evidence thereof cannot be considered on review. The remedy for

such a state of affairs is to apply to Congress. But the point is absolutely without merit, because on contempt proceedings the appellant court will not review the evidence relating to present ability or to any other question of fact.

Morehouse vs. Pacific Hardware & Steel Co., 177 Pac. 337 (C. C. A. 9th).

In re Fuhrman, supra, (C. C. A. 9th).

Therefore, whether upon a review from the trustee's petition alleging concealment and findings based thereon or upon a review of contempt proceedings this Court cannot consider the facts.

IV.

What we just said concerning "now possess" answers the objection that the court found that the bankrupts "now conceal" said assets.

V.

The bankrupts contend that the trustee should have alleged in so many words that they had the present ability to make delivery. The bankrupts do not discuss the point in their brief and the point is not well taken. It could not well be contended that the bankrupts were misled. It was alleged that they possessed the merchandise and the prayer was that

they deliver it over to the trustee. The object of the petition, the relief sought, was an order in *personam* to deliver physical possession of the assets presently withheld by the bankrupts, and no one could possibly mistake that. Thus the facts or elements constituting present ability were pleaded without the conclusion being attached. But the more conclusive answer is that this is a matter of defense.

In re Stavrahn, 174 Fed. 330, (C. C. A. 2), Judge Lacombe said:

> "We do not find in the statute, the general orders, or in any decision which has been called to our attention, any authority for the proposition that the petition should contain an affirmative allegation of the bankrupt's present ability to comply with the order requiring him to turn over property. That is more properly a matter of defense. When the moving papers indicate that it has been determined after a full hearing that the bankrupt has concealed some specific piece of property, that he has been ordered to turn it over to the trustee, that he has been duly served with such order, and that he has failed to comply with such order, sufficient is charged to put him upon his defense."

In re Fuhrman, supra.

The petition filed before the referee herein contains all the requisites pointed out in

Kirsner vs. Taliaferro, supra, page 58.

VI.

Error is alleged of the finding of the *present ability* of the bankrupts to deliver said assets to the trustee on the grounds of immateriality, not an issue, and without warrant of law. Abundant authority sustains the lower court.

American Trust Co. vs. Wallis, 126 Fed. 464 (C. C. A. 3):

> "In the absence of fraud or concealment, the bankrupt court can only order the delivery of property to the trustee which the bankrupt is physically able to deliver up, having the same in his possession or control. If it shall appear that he is not physically able to deliver the property required by the order, then, confessedly, proceedings for contempt, by fine and imprisonment, would result in nothing, certainly not in compliance with the order. The contempt in this case could only be purged by a reiteration of the physical impossibility to comply with the order whose disobedience is being thus punished. An order made under such circumstances would be as absurd as it is inconsistent with the principles of individual liberty."

Kirsner vs. Taliaferro, supra (4th).

Samel vs. Dodd, 16 A. B. R. 169, 142 Fed. 68

(C. C. A. 5th, concurring opinion):

> "But, unless the person can perform the act commanded, the court has no authority to punish for a failure to perform it. Any other rule would be unreasonable and unjust. To imprison one for not doing what he cannot do

is inconsistent with the principles of individual liberty. There is no statute of law which confers such authority. Imprisonment under such circumstances for failure to pay money may force the friends of the prisoner to raise and pay the required sum, but such imprisonment is unwarranted by law in a jurisdiction where imprisonment for debt is forbidden. Where the prisoner has the power to comply with the order, having the money or thing in question in his possession, he may, of course, be punished for his failure to surrender it, without conflict with any rule of law against imprisonment for debt."

In re Baum, 169 Fed. 410, (C. C. A. 8th): "The Court, of course, could not require the petitioner doing an impossible thing and then punish him for refusing to perform it. Therefore, from the fact that the court ordered him to pay over the money, it must necessarily have had before it testimony sufficient to satisfy it of his inability to comply."

Schweer vs. Brown, supra.

In re Rosser, 101 Fed. 562, (C. C. A. 8th, contempt case).

Ripon Knitting Works, vs. Schreiber, 101 Fed. 810, affirmed 104 Fed. 106, (C. C. A. 9th).

In re Fuhrman, 220 Fed. 787, (C. C. A. 9th).

In re Sax, 15 A. B. R. 456 (D. C. Pa.):

"If it be clearly shown that a bankrupt has money or goods in his possession that belong to

his trustee, he must take the consequences of a refusal to hand them over, but he should not be summarily directed to pay *unless the court is morally certain that there has been concealment* and *that obedience to the order can be enforced.* If the bankrupt has been guilty of fraudulent concealment, but no longer has the goods or the money, he should be prosecuted. He should not be imprisoned on a summary proceeding for contempt, unless he is disobeying an order with which he is able to comply."

In re Barton Bros., 18 A. B. R. 100, 149 Fed. 620 (D. C. Ark.):

"It is seen, by an examination of the two decisions last quoted, unless they were in possession of the money at the time the order is made to pay over, the court has no power to make the order. If the court were to make the order for them to pay over when they were without the means of paying over, the court would then be requiring them to do an impossible thing, and the effect of such an order would be equivalent to imprisonment for debt."

In re Milk Co., 16 A. B. R. 731 (D. C. Pa.).

In re Dickens, 175 Fed. 808, (D. C. Alas.).

In re Nisenson, 182 Fed. 912, (D. C. N. J.).

In re Ruos, 164 Fed. 749, (D. C. Pa.).

In re Adler, 170 Fed. 634, (D. C. Okla.).

In re Mize, 172 Fed. 945, (D. C. Ala.).

In re Holland, 176 Fed. 624, (D. C. N. Y.), (Contempt).

In re Mayer, 98 Fed. 839, (D. C. Wis.).

Remington on Bankruptcy, Sec. 1842, page 1137:

> "The order operates in *personam,* upon the person of the offender, by requiring him to do the thing commanded upon penalty of punishment for refusal; and such an order is erroneous, as matter of law, unless it plainly and affirmatively appear from the record that he has the power to comply with its requirements. If, having the property, he fail to surrender it in obedience to the order of the court, he vountarily submits himself to the consequences."

9 *Cyc.* 13, 14.

To require such a finding before entering an order to deliver assets is a protection to the bankrupts and distinctly for their benefit.

VII.

The property claimed to be withheld is specified in paragraph II of the findings of fact, (R. 39) and the order directed delivery and surrender of

> "men's and boys' suits, shirts, underwear, suspenders, hose, handkerchiefs, gloves, bathing suits, overalls, umbrellas, suit cases, suits, aprons, coats, quilts, hats, collars, leggins, overcoats, of the kind formerly owned and possessed by said bankrupts in conducting the certain store of said bankrupts, at 115 Holly Street, Bellingham, Washington, of the value of $3,189.08 belonging to the said estate in bankruptcy herein, now in the possession and under

the control of the said David Jacobs and the said Isaac Jacobs, and each of them." (R. 45).

This description was sufficient under all the cases that we have been able to find relating to the subject.

In *Ripon Knitting Works vs. Schreiber, supra,* Judge Hanford said:

> "The principle of law and justice does not exact of those who have incurred loss by extending credit to a dishonest merchant the impossible thing of tracing the proceeds of merchandise which he has delivered before compelling him to surrender money in his possession which rightfully should be applied to the trustee of their accounts. In this case it is impossible for the trustee or the creditors to identify the pieces of money which have come into the bankrupt's hands or to identify or describe the particular pairs of shoes which were sold for money which the bankrupt now conceals; and, being impossible, it is unnecessary." Affirmed 104 Fed. 1006, (C. C. A. 9th).

Kirsner vs. Taliaferro, 202 Fed. 51 (C. C. A. 4th):

> "The bankrupt says that there was error because the court below undertook to decree against him for certain goods without specifying or describing in any manner the same so as to enable him to know how or in what manner to comply with said order. The goods were described as such as he had carried in his stores, viz., dry goods, notions, and ladies' ready-made wear of the cost or wholesale price of $4,166.54. This was sufficiently definite."

In re Lesaius, 163 Fed. 614, (D. C. Pa.):

> "Neither is it necessary to do more than describe the property generally, as consisting, for instance, in the present case, of gentlemen's furnishings and clothing, such as the bankrupt was carrying. To require greater particularity would make such proceedings practically nugatory. *Ripon Knitting Works vs. Schreiber* (D. C.) 4 Am. Bankr. Rep. 299, 303, 101 Fed. 810. This would not be necessary even to convict upon indictment."

The findings and order in the case at bar are more definite than the finding of the court in *Stuart vs. Reynolds*, 204 Fed. 709, (C. C. A. 5th).

It is to be noted that counsel for bankrupts do not argue the matter in their brief.

VIII.

The last point is that the trial court found that finding No. 11 was established beyond all reasonable doubt. Just how such a finding could possibly prejudice the bankrupts is not apparent.

Schweer vs. Brown, supra, (C. C. A. 7th).

In the First Circuit the rule is that such findings need only be sustained by a preponderance of the evidence.

In re Cole, 144 Fed. 392, (C. C. A.).

In re Cramer, 175 Fed. 879, (D. C. Mass.).

In all other jurisdictions, we believe, the rule of the courts is that such findings must be sustained by evidence beyond a reasonable doubt.

In re D. Levy & Co., 142 Fed. 442, (C. C. A. 2nd.).

Kirsner vs. Taliaferro, supra, (C. C. A. 4th.).

Stuart vs. Reynolds, 204 Fed. 709, (C. C. A. 5th).

In re Rosser, 101 Fed. 562, (C. C. A. 7th).

Boyd vs. Glucklich, supra, (C. C. A. 8th).

In re Fuhrman, 220 Fed. 787, (C. C. A. 9th. Contempt).

In re Mayer, 98 Fed. 839, (D. C. Wis.).

In re Gottardi, 114 Fed. 328, (D. C. Calif.).

In re Adler, 129 Fed. 502, (D. C. Tenn.).

In re Feldser, 134 Fed. 307, (D. C. Pa.).

In re Walder, 16 A. B. R. 41, (D. C. Conn.).

In re Alphin & Lake Cotton Co., 134 Fed. 477, (D. C. Ark.).

In re Lesaius, 163 Fed. 614, (D. C. Pa.).

In re Mize, 172 Fed. 945, (D. C. Ala.).

In re Dickens, 175 Fed. 808, (D. C. Ala.).

In re Kreuger, 197 Fed. 124, (D. C. Ky.).

Ripon Knitting Works vs. Schreiber, supra, (D. C. Wash.).

Or that the evidence should be indisputable.

American Trust Co. vs. Wallis, 126 Fed. 464, (C. C. A. 3rd).

Or of unusual cogency.

In re Sax, 141 Fed. 223, (D. C. Pa.).

In re Nisenson, 182 Fed. 912, (D. C. N. J.).

Or clear and convincing.

Samel vs. Dodds, 142 Fed. 68, (C. C. A. 5th).

Or incontestible.

Rem. on Bankruptcy, Vol. 1, page 1137, Sec. 1842.

In their brief counsel practically admit such quality of proof essential. (See page 14).

Counsel for bankrupts seem to contend that the trial court found that the concealment of the $3,189 worth of merchandise was established by unsatisfactory testimony and refers to paragraph No. 9: "that the testimony is unsatisfactory as to what disposition was made of this merchandise." (R. 42). A glance at finding No. 9 shows that the evidence referred to is the concealment of *other* merchandise,

which was covered by the trustee's second petition, which the Court refused to enforce because he was not convinced beyond a reasonable doubt. The Court said: (R. 34).

> "The Court heard all of the evidence presented and carefully read all of the testimony taken before the referee. A consideration of this testimony convinces me beyond any question of doubt that the bankrupts did retain and fail to account for a sum not less than that found by the referee, $3,189.00."

Concerning the second petition the Court said: (R. 37).

> "While there is testimony which leads to the conclusion that the bankrupts have in their possession sums in excess of the amount found by the referee, the testimony is not clear and convincing, and I think the petition for return of $20,962.41 should therefore be denied."

IX.

We note that counsel for the bankrupts states that the findings do not support the conclusions and order of the Judge, (Brief, 7), but fail to find any discussion of the question or any cases in point.

CONCLUSION.

The petition alleging concealment and the findings of the court were drawn in accordance with the

decisions of this circuit and the overwhelming weight of authority of the federal courts generally. The lower court applied the most rigid rules to the case of the trustee; extended every protection to the bankrupts. Instead of ordering them to turn over approximately $20,000 worth of merchandise, he released them from the second petition because the evidence was not convincing beyond a reasonable doubt, and held them responsible for the $3,189.08 set forth in the first petition and established with the mathematical precision of two exact inventories, itemized by quantities and cost prices. Having had a fair hearing before both the referee and the district judge, who heard the testimony of the bankrupts on discharge and on the second petition covering largely the same evidence taken before the referee, and having been safeguarded by every rule of practice designed for the protection of such persons, an affirmance is respectfully prayed.

Respectfully submitted,

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